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John
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AND THE

MASSACHUSETTS DECLARATION OF RIGHTS.

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A PAPER READ BEFORE THE

MASSACHUSETTS HISTORICAL SOCIETY

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JUDGE LOWELL AND THE MASSACHUSETTS DECLARATION OF RIGHTS.

There has been for some years a tradition in the family of Judge John Lowell (who was born in 1743 and died in 1802) that he, as a member of the Convention which framed the Constitution of Massachusetts in 1779-80, introduced the first article, or the first clause in the first article, of the Declaration of Rights; and that its insertion was proposed by him for the express purpose of abolishing slavery in this State. The statement has found its way into some of our biographical dictionaries; but it appears, perhaps in its most authentic form, in a letter from the Rev. Charles Lowell, D.D., a son of Judge Lowell, written in 1856.

"My father," he writes, "introduced into the Bill of Rights the clause by which slavery was abolished in Massachusetts. You will find, by referring to the Proceedings of the Convention for framing the Constitution of our State, and to Eliot's New England Biographical Dictionary, that he was a member of the Convention and of the Committee for drafting the plan, &c., and that he suggested and urged on the Committee the introduction of the clause, taken from the Declaration of Independence a little varied, which virtually put an end to slavery here, as our courts decided, as the one from which it was taken ought to have put an end to slavery in the United States. This he repeatedly and fully stated to his family and friends. . . . In regard to the clause in the Bill of Rights, my father advocated its adoption in the Convention, and when it was adopted exclaimed: '*Now there is no longer slavery in Massachusetts; it is abolished, and I will render my services as a lawyer gratis to any slave suing for his freedom, if it is withheld from him,*' or words to that effect."*

* Letter to Charles E. Stevens, author of "Anthony Burns, A History," Boston, 1856, pp. 234, 235.

It certainly would be consonant to my own feelings to award such an honor to so distinguished a citizen as was Judge Lowell; but I cannot forbear, in justice to history, to express my belief that this tradition has no foundation in fact, and I will give my reasons for this opinion.

The Convention for framing the Constitution of Massachusetts met at Cambridge, on the first day of September, 1779. On the 4th of that month, a committee of *thirty*, of which the Hon. James Bowdoin was chairman, was chosen "to prepare a frame of a Constitution and Declaration of Rights," to be submitted to the Convention. Four days afterward the Convention adjourned, to meet again on the 28th of the following month. During the recess the committee entered upon the important work assigned to them; and, when the Convention again met, submitted their report in a printed form, copies of which were distributed among the members.

The journal or record of this committee of thirty, if any was kept by them, is not known to be in existence; but we know, from other sources, that the committee delegated to a sub-committee of *three* the duty of preparing a draft of a Constitution. The three were Mr. Bowdoin, Samuel Adams, and John Adams. By this sub-committee the task was intrusted to John Adams alone, who performed it. To them the draft was submitted; and they accepted it, with only one trifling erasure. It was then reported to the Grand Committee, who made some alterations. The preparation of a Declaration of Rights was intrusted by the general committee to Mr. Adams alone, and it was reported by him. "The article respecting religion," the third article, he says, "was the only article I omitted to draw."*

* I am indebted to the Hon. Charles Francis Adams for the following extract of an unpublished letter from John Adams to Judge W. D. Williamson, dated 25 Feb., 1812:—

"In 1779 the General Court recommended to all the towns to choose representatives to meet at Cambridge, with full powers to agree upon a Constitution or frame of government to be laid before the towns for their approbation or rejection.

"The Convention met in August [September 1], in the Congregational Church in Cambridge, and, after some weeks [days] of deliberation and discussion, appointed a large committee of thirty members to sit in Boston and prepare a plan. This committee, after some weeks of debate, appointed a sub-committee of three members to make a draft. The three were Mr. Bowdoin, Mr. S. Adams, and myself. When we met, Mr. Bowdoin and Mr. S. Adams insisted that I should prepare a plan in writing, which I did. When I laid it before them, after deliberating upon it, they agreed to it, excepting only to one line, of no consequence, which I struck out. We reported it to the committee of thirty, where it underwent a thorough investigation. They struck out two things, to my sorrow. One was an unqualified negative to the governor. Another was the power to the governor to appoint all militia officers, from the highest general to the lowest ensign. The article relative to religion was not drawn by me, nor by the sub-committee. The Declaration of Rights was drawn by me, who was

To what extent the draft of the Declaration and Frame of Government were modified by the Grand Committee, before they were submitted to the Convention, we have no means at the present day of determining. That suggestions, more or less important, were made by some of the distinguished men who were members of that committee, is certain; but it is equally certain that the Report to the Convention was substantially as it came from the hands of Mr. Adams. (See *Works of John Adams*, iv. 216; vi. 463, 465; ix. 507, 618, 623; *Proceedings of Mass. Hist. Soc.* for November, 1860, pp. 87-92.)

The first article in the Declaration of Rights, which, it is said, Mr. Lowell caused to be inserted, is as follows:—

“All men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness.”

Now it is very well known to the student of our history, that many of the fundamental principles of the Massachusetts Declaration of Rights, and much of its language, were taken from the Virginia Declaration, as drawn up by that sterling patriot, George Mason, and adopted by the Convention at Williamsburgh, on the 12th of June, 1776. Or, perhaps, it would be more accurate to say that the Massachusetts Declaration corresponds more nearly, in the provisions common to both, to the language of the Pennsylvania Declaration adopted a few months after that of Virginia, the latter being, however, the common source.

appointed alone by the Grand Committee to draw it up. The article respecting religion, as I said before, was the only article which I omitted to draw. I could not satisfy my own judgment with any article that I thought would be acceptable, and, further, [I thought] that some of the clergy or older and graver persons than myself would be more likely to hit the taste of the public.”

Mr. Adams continued to attend the meetings of the Convention till two days before he embarked for Europe, on the 13th of November, 1779. On the 4th of November, he writes thus from Braintree to B. Rush:—

“Your favors of Oct. 12th and 19th are before me. I should not have left the first unanswered seven days, if it had not been for my new trade of a Constitution monger. I enclose a pamphlet as my apology. It is only a report of a committee; and will be greatly altered, no doubt.”—*Works of John Adams*, ix. 507.

In a letter to Edmund Jennings, dated 7th June, 1780, immediately after the Constitution had been ratified by the people, he says:—

“I was chosen by my native town into the Convention two or three days after my arrival [from Europe]. I was, by the Convention, put upon the committee; by the committee, upon the sub-committee; so that I had the honor to be principal engineer. The committee made some alterations, as, I am informed, the Convention have made a few others, in the report; but the frame and substance is preserved.”—*Ibid.*, iv. 216.

In a letter to John Taylor written in 1814, Mr. Adams speaks of “this constitution, which existed in my handwriting,” &c.—*Ibid.*, vi. 465.

No man was more familiar with these state papers than was Mr. Adams. He made them the subject of discussion with M. Marbois on their voyage from Europe to this country in 1779, from which he arrived just in time to be chosen a delegate to the Convention for framing the Constitution of Massachusetts, and of course he had them before him while employed upon the important duty assigned to him. The curious reader may be interested to see how nearly the first article of the Massachusetts declaration, given above, corresponds to the first article from the Virginia Declaration, which follows:—

“That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.”

That of Pennsylvania is as follows:—

“That all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining happiness and safety.”

With these facts before us, it seems altogether improbable that John Adams, while drawing so largely from the Virginia and Pennsylvania Declarations of Rights, and from the latter very much in the order in which the several articles lie in that state paper,* should have omitted the first and most important article, containing principles and declarations so accordant to his own feelings and convictions; and have left that article, or the first clause in that article, to be prefixed by the Committee of Thirty. For it is on this violent supposition alone that it becomes possible for us to believe that the article referred to, or the first clause in it, could have been introduced on motion of Mr. Lowell in the Grand Committee, of which he was a member. Besides, we have the statement of John Adams himself, already cited, that the article respecting religion was the only article which he omitted to draw. The reader will consult in vain the Proceedings or Journal of the Convention, published by the State in 1832, or Eliot's Biographical Dictionary, cited as authority by Dr. Lowell, for any evidence that John Lowell “suggested and urged on the committee the introduction of the clause” referred to. Of course, the Journal of the Convention would not record what passed in the committee; and it is equally silent as to any exhibitions of exultation on the passage of this article in the Convention.†

* The articles in the Massachusetts Declaration of Rights number thirty, while those in the original Pennsylvania Declaration numbered sixteen. Numbers 1, 2, 4, 5, 7, 8, 9, 10, 12, 11, 15, 16, 17, and 18 of the former, correspond to numbers 1-14 of the latter. The language is often different, some of the articles in each paper being more amplified than the corresponding articles in the other.

† As I have said above, the Convention reassembled to hear and act upon the

The assertions of natural right embodied in these several Declarations were familiar to the public mind of Massachusetts at that period. The Declaration of Independence of 1776, issuing from a committee of which Mr. Adams was a member, followed in a few weeks the Declaration of Virginia referred to above; while that of Pennsylvania soon succeeded. The same familiar principles are afterwards found embodied in the report of the committee of a Convention which met at Ipswich, in this State, in May, 1778, in which the defects of a Constitution recently rejected by the people of Massachusetts were ably exposed,—a report said to have been drawn up by Theophilus Parsons, a legal luminary just then rising into notice. "All men," he says, "are born equally free; the rights they possess at their births are equal, and of the same kind. Some of those rights are alienable, and may be parted with for an equivalent. Others are unalienable and inherent, and of that importance that no equivalent can be received in exchange," &c. (See *Essex Result*, pp. 12, 13.)

Judge Lowell's sympathies were undoubtedly in favor of the freedom of the colored race. In answer to Dr. Belknap's inquiries, in 1795, relating to slavery in Massachusetts, Judge Sullivan, under date of April 9th, writes: "The first causes brought by negroes against their masters were conducted by Judge Lowell, who can give you an account of that business." (*MS. letter.*) These well-known views and benevolent exertions of Judge Lowell had no doubt left their impression on the minds of his family.

Judge Sullivan does not say whether these causes were brought before or after the adoption of the Constitution. That Dr. Belknap did consult Judge Lowell on the occasion referred to is probable. No letter of his exists, among others now extant, written in answer to Dr. Belknap's inquiries; but Judge Lowell's name is placed in the margin

report of their committee on the 28th October. On the 29th, in the afternoon, the Journal proceeds to say: . . . "The Declaration of Rights was then read; and, on a motion made and seconded, the same was voted to be taken up by propositions. The preamble and the 1st article, after sundry amendments, being accepted," &c. Now, having the Report of the Committee before us, and the Constitution as adopted, we are able to see what amendments, if any, were made in the first article. The only amendment was the striking out the word *their* in the phrase "protecting their property." I will add, though all this has no immediate connection with the purpose of this communication, that in the *text* of the printed Report of the Committee the first clause of the Declaration reads, "All men are born equally free and independent"; but in a table of Errata on the last page it is corrected to read, "All men are born free and equal." This correction should not be regarded as an amendment made by the Convention; yet in reprinting this report in 1832, the Committee of the Legislature disregarded the whole of the Errata, which contained other corrections, more particularly in the last clause of the preamble; and the reader of that volume would necessarily conclude that the changes suggested by the Errata formed part of the amendments by the Convention. See *Proceedings of this Society for November, 1860*, pp. 88–92.

of the *original manuscript* of Dr. Belknap's reply to Judge Tucker (as are other names for a similar purpose) as authority for a statement relating to trials for freedom before the judicial courts, prior to the Revolution,—a statement incorporated with others relating to the same subject into one paragraph, as printed on pages 202-203 of Vol. IV. Mass. Hist. Coll.

The form used by Mr. Jefferson, in the Declaration of Independence, is more simple, but equally expressive: "All men are created equal."

The doctrine taught in these several forms of expression was, as I have said, familiar to the fathers of the Revolutionary era; indeed, it can be traced to a much earlier period. Not to refer to Locke and Sidney, I may mention that Sir Robert Filmer, who doubted its soundness in his "Patriarcha," published in 1680, traces it to Bellarmine, who was born in Tuscany in 1542. On page 11 of that volume, Filmer quotes that writer, in maintaining the "natural liberty of the people," as saying that it is evident from scripture that God hath given or ordained *power*; "but God hath given it to no particular person, because *by nature all men are equal*; therefore he hath given power to the people or multitude."*

Whatever may have been the significance of the first clause of the article under consideration to the minds of Mr. Mason and Mr. Adams, it is interesting to notice how widely different has been its interpretation in the States represented by these eminently patriotic citizens. In 1783 it was held by the Supreme Judicial Court of Massachusetts that the clause in question abolished slavery within this State. The first section in the Virginia Declaration of Rights, which is a part of her Constitution, stands to day, I believe, substantially as it came from the hands of George Mason.†

Slavery was abolished in Massachusetts by force of public opinion manifesting itself through her judicial courts. It was provisionally abolished in Virginia and her sister slave-states more than three-quarters of a century later, only by force of the public opinion of the nation, expressed through the supreme magistrate as the commander-in-chief of the army, during the rebellion of the States in which it existed; and consummated by an amendment of the Constitution of the United States.

* See also Professor Washburn's "Origin and Sources of the Bill of Rights" of Massachusetts, in Proceedings for June, 1865.

† "The state of New Hampshire established their constitution in 1783; and in the first article of the Declaration of Rights it is asserted that 'all men are born equally free and independent.' The construction there put on this clause is that all who have been born since the constitution are free, but that those who were in slavery before are not liberated by it. By reason of this construction (which, by the way, I do not intend to vindicate), the blacks in that state are in the late census distinguished into free and slaves, there being no Indians residing within those limits." (Dr. Belknap to Judge Tucker in 1795, in 1 Mass. Hist. Coll. IV. 201.)

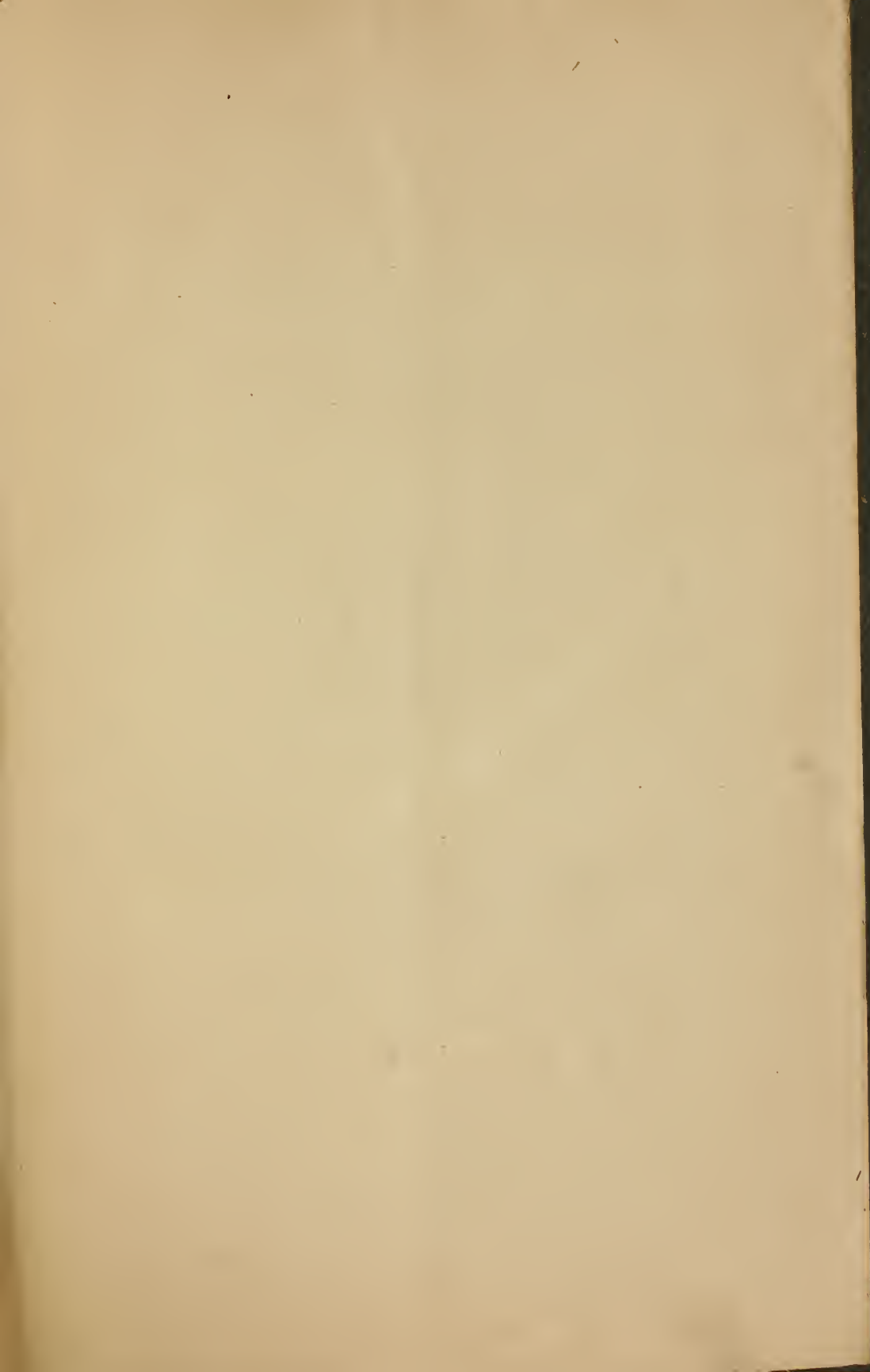
To this brief statement of facts the following supplementary observations may be added :—

John Lowell was a sagacious lawyer. If he had intended to introduce a clause into the Constitution of Massachusetts to effect the abolition of slavery, would he have chosen for that purpose a form of language which for three years had existed in the constitutions of both Virginia and Pennsylvania, and had in each failed to accomplish the purpose which it is said he wished to accomplish here? * On the contrary, would he not have avoided such language; or rather would he not have added to it some positive declaration, such as that "neither slavery nor involuntary servitude, except as a punishment for crimes, &c., shall exist in this State"? He could have had no ground for predicting a judicial interpretation of the familiar clause adopted that would operate to abolish slavery here. Indeed, Judge James Winthrop, one of the founders of this Society, in answer to the queries of Dr. Belknap on this subject, in 1795, says of this decision, "By a misconstruction of our State Constitution, which declares that all men by nature are free and equal, a number of citizens have been deprived of property formerly acquired under the protection of law." — *Ms. letter*.

It may be added that the first article in the Declaration of Rights in the Constitution of Vermont, established in 1777, asserts "that all men are born equally free and independent, and have certain natural, inherent, and unalienable rights, amongst which are the enjoying and defending life and liberty," &c., the exact language of the Pennsylvania Declaration. But this language was not used with the intention of abolishing slavery in Vermont, for immediately following we read: "Therefore, no male person, born in this country, or brought from over sea, ought to be holden by law to serve any person as a servant, slave, or apprentice, after he arrives at the age of twenty-one years, nor female in like manner, after she arrives at the age of eighteen years, unless they are bound by their own consent, after they arrive to such age, or bound by law for the payment of debts, damages, fines, costs, or the like." — *Vermont State Papers*, p. 244.

This was two years before the convention met to frame a constitution for Massachusetts.

* Judge Tucker, in *A Dissertation on Slavery*, in Virginia, published in 1796, the year after his correspondence with Dr. Belknap, already referred to, took place, says: "The Roman lawyers look upon those only properly as *persons* who are *free*, putting *slaves* into the rank of *goods* and *chattels*; and the policy of our legislature, as well as the practice of slaveholders in America in general, seems conformable to that idea." — p. 49.



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